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## THE CASE OF JOSIAH PHILIPS\*

THE case at law which forms the subject of this paper, while it cannot be said to be celebrated, has nevertheless attracted some little attention and is in itself not devoid of interest. Close students of Patrick Henry's career will remember it as the occasion of considerable criticism directed against that statesman, while to such persons as have investigated the origin of judicial power over unconstitutional legislation its name will not be unfamiliar as that of a shadowy and problematical forerunner of the more famous causes of *Holmes vs. Walton* and *Trevett vs. Weeden*. None of the historians and jurists that have mentioned it seems, however, to have thoroughly unravelled its complications or to have perceived its interest as one of the most curious examples of the use of a pure bill of attainder that can be found in our history. Its queer interest to the psychologist and student of human nature has also, and not unnaturally, been passed over by these investigators. That interest will, it is hoped, keep the pages that follow, which must of necessity deal with a mass of historical and legal details, from being caviare to the general reader of this REVIEW.

The counties of Princess Anne, Norfolk, and Nansemond form a rough quadrilateral in the southeastern corner of the map of Virginia. The first named and most eastern of the three was formed from Norfolk in 1691, the boundaries of its first parish, Lynnhaven, having been fixed, however, by an act of the Burgesses nearly fifty years previously. Apart from their connection with a well-known variety of oyster, the county and parish, covered as they are with swamps and sparsely inhabited by fishermen, could hardly be expected to furnish us with annals enlivened by many episodes of historical importance. Three such episodes are known to the present writer, the first being the trial of Grace Sherwood for witchcraft in 1706, the second being the occupation of the region by Lord Dunmore with its consequent persecution of the poor but patriotic inhabitants, and the third being the subject of this paper.<sup>1</sup>

Josiah Philips was a laborer of Lynnhaven parish who for three years (1775-1778) gave the authorities of his state more trouble

<sup>1</sup> For a sketch of Lynnhaven parish see Bishop Meade's *Old Churches*, etc., I. 246; for an account of Grace Sherwood's trial, see Howe's *Hist. Coll. of Va.*, p. 435.

than any one citizen had done since the death of Nathaniel Bacon. Why he should have left his peaceful calling, whatever it may have been, and become a public enemy and robber is not known and is now little likely to be discovered. Certain it is, however, that he headed a dangerous insurrection in the counties of Princess Anne and Norfolk, that he aided Dunmore in his designs, and that many poor and innocent people were made the victims of atrocious outrages committed by his followers. The country was admirably suited for the operations of the bandits, for the numerous swamps afforded impenetrable hiding-places and at the same time so separated the country people from one another that they could be attacked by families. Of course the robbers had their own friends who helped them to escape and threw the officers of justice off the scent, and the distracted state of the Commonwealth, owing to the pressure of war and to Dunmore's presence, enabled them to pursue their calling with a hardihood which would have been impossible in times of peace.

The first reference to Philips that has been unearthed occurs in the *Journal of the Convention* for 1775 (page 9). A letter was read in that body on Thursday, August 3, from the officers of the volunteer companies of Williamsburg, stating "that one *Philips* commanded an ignorant disorderly mob, in direct opposition to the measures of this country, and they wished to crush such attempts in embryo." There is little doubt that this letter marks the time when the first vague rumors of Philips' doings reached Williamsburg.

For nearly two years nothing more is heard of the man, but it is evident that he was not idle, for on the 20th of June, 1777, we find the Privy Council advising the Governor, Patrick Henry, to offer a reward of one hundred and fifty dollars to whoever should apprehend and "convey to a magistrate at Norfolk County" any one of three designated persons, — Livy Sykes, Josiah Phil[ilips], or John Ashley. This action was taken in consideration of a letter from John Wilson, county lieutenant of Norfolk, complaining of the misdeeds of insurgents and robbers, numbering ten or twelve, and headed by the above-named ringleaders.<sup>1</sup>

The proclamation issued by Henry on the same day with the meeting of the Council referred to above seems to have been successful, for on January 3, 1778, the Council authorized the governor to issue a warrant for fifty-five pounds, "for the purpose of rewarding sundry persons for apprehending Josiah Philips."<sup>2</sup> But the

<sup>1</sup> *Journal of the Privy Council* (MS.), 1777-8, p. 19.

<sup>2</sup> *Council Journal*, 1777-8, p. 166.

money was spent to little purpose, for on Friday, May 1, we find Philips at the head of a band of fifty men with a price of five hundred dollars on his head and the militia of Nansemond ordered out against him.<sup>1</sup>

At this point Wirt takes the matter up in his well-known life of Henry, and gives at length a letter from the above-mentioned Colonel Wilson of Norfolk to Governor Henry bearing date May 20, 1778. The writer recounts the difficulty of getting the recalcitrant Princess Anne militia to track the robbers to their hiding-places in the swamps, and, in a postscript, dated four days later, holds out as little hope with regard to the militia from Nansemond. The concluding sentence runs as follows: "We have lost Captain Wilson [whether a relative of the writer's or not, does not appear] since his return: having some private business at a neighbour's, within a mile of his own house, he was fired on by four men concealed in the house, and wounded in such a manner that he died in a few hours; and this will surely be the fate of a few others, if their request of the removal of the relations and friends of these villains be not granted which I am again pressed to solicit for. . . ."

Did not one know that this letter was written in Virginia in the last century, one might well fancy that it came from Ireland in this. Governor Henry at once laid it before the Council, but not before he had consulted Mr. Jefferson, who was decidedly the leading man in the House of Delegates. The Council recommended him to send it to the General Assembly, and to order a company of regular troops to the scene of action, which advice was followed in both respects.<sup>2</sup> Indeed, it is most likely that the letter which Henry on the advice of the Council transmitted to the Speaker of the House, the Honorable Benjamin Harrison, had been prepared at the instigation of Jefferson, before the meeting of the Council. This letter is given in Wirt and needs no comment here. Immediately upon its receipt, the governor's communication was read to the House and was referred to a committee of the whole on the state of the Commonwealth. This committee, after some discussion, resolved to consider the subject in a similar committee the next day (May 28).

The committee did consider, and reported that Philips and his associates ought to be attainted of high treason, unless they should surrender before a day in June to be subsequently determined. Messrs. Jefferson, Smith, and Tyler were then appointed a com-

<sup>1</sup> *Council Journal*, 1777-8, p. 246.

<sup>2</sup> *Ibid.*, 1777-8, p. 260.

mittee to draw up the proper bill of attainder. They reported a bill on the same day, which in all probability had been previously drafted by Mr. Jefferson immediately after his interview with Governor Henry. This bill, which fixed the last day of June as the day of grace, may be found in Wirt and in Hening's Statutes.<sup>1</sup> It was read a second time on the following day (May 29) and ordered to be engrossed and read a third time. On Saturday, May 30, it was read a third time and passed, Mr. Jefferson being ordered to carry it to the Senate. Later in the same day, Mr. Holt came in from that body with a message that they had agreed to the measure. Such were the legislative steps in this remarkable case—steps the precipitancy of which was destined to elicit much criticism.<sup>2</sup>

A reference to the letter which the governor transmitted to the Speaker of the House will show that Henry made no specific recommendations as to the course the Legislature should pursue. There was no necessity for him to do so, for we learn from a letter which Jefferson wrote to Wirt many years later, that both the governor and himself had already agreed that a bill of attainder was the proper remedy.<sup>3</sup> That Mr. Henry should have favored such a course causes no surprise; it was but consistent with his opposition to the insertion of a clause against bills of attainder in the state constitution of 1776, an opposition which, according to Edmund Randolph,<sup>4</sup> defeated the proposal. But it is a little surprising to find the philosophic Jefferson, the friend of liberty and of the rights of man, not only agreeing in such a measure, but drawing up the bill of attainder with his own hand, and defending his action nearly forty years later.<sup>5</sup> It may be well to remember, however, that not long since he had thought himself threatened with attainr by the English Parliament, and that, therefore, he might have thought retaliation to the very letter amply justified in those warlike times.

<sup>1</sup> Hening, IX. 463.

<sup>2</sup> Wirt gives a full account of these steps, but errs in representing the Senate to have kept the bill over Sunday. Mr. Ford (Jefferson's *Writings*, II. 149, note) speaks of it as passed on the 29th. See Henry's *Henry*, I. 611-613. The facts cited may be verified by reference to the House Journal for 1778 (Spring Session), pp. 20, 22, 24, 28, 33, 35.

<sup>3</sup> Jefferson's *Works*, VI. 369.

<sup>4</sup> This is clear from a statement made on p. 66 of Edmund Randolph's *History of Virginia*, the fragmentary manuscript of which belongs to the Virginia Historical Society.

<sup>5</sup> That Mr. Jefferson drew up the bill is evident, first, from his consultation with Henry, and from the short time the committee took to report the bill; secondly, from the fact that the report of the committee of the whole has been found in Jefferson's own handwriting.

Within six weeks from the passage of the act of attainder, Philips and at least three others of his band were captured and brought to Williamsburg. Two entries in the Council Journal,<sup>1</sup> respecting rewards, are our sole information in regard to the capture itself; but we can form some idea of the fear caused by the desperadoes from the fact that a petition was sent to the Council, signed by a number of the inhabitants of Princess Anne and Norfolk, "praying that a strong and sufficient guard" might "be kept over Philips and the rest of the Prisoners of his daring party of Robbers. . . ." <sup>2</sup>

The records of the General Court having been destroyed during the late war, we are indebted to the appendix to Wirt's *Henry* for what we know about the trial of the outlaws. From the extracts which Mr. Wirt had made from the records, we learn that on October 20, 1778, Philips was indicted for feloniously taking from one James Hargrove "twenty-eight men's felt hats of the value of twenty shillings each, and five pounds of twine of the value of five shillings each pound." Of this offence, a jury found him guilty on the same day, and seven days later he was brought to the bar and, having no new plea to make (he had previously pleaded a commission from Dunmore), was sentenced to be hanged. The next day (October 28) the court ordered that the execution should take place on Friday, the fourth of December. Wirt concludes his appendix with an extract from Dixon and Hunter's newspaper of December 4, 1778, showing that the execution of Philips and at least two of his associates did actually take place. We have thus followed Philips the man to his deserved fate, and can afford to dismiss all further thought of him, except as the subject of his own *case*.

The question at once arises — why was Philips tried for robbery when by the very terms of the act of attainder nothing was necessary but an order of the General Court for his execution? Why should the attorney-general, Edmund Randolph, have risked the chances, slight though they were, of acquittal, and the still greater chances of rescue or escape from prison consequent upon delay? Upon this point hinges, for the most part, the interest that attaches to the Philips case; but before entering upon its discussion we must imagine that ten years have passed by, and that we are listening intently to the debate going on in the convention which sits in the Public Buildings in the town of Richmond for the pur-

<sup>1</sup> *Council Journal*, 1777-78, pp. 310, 348. See also *Journal of the House of Delegates*, 2d Session, 1778, pp. 39, 55.

<sup>2</sup> *Council Journal*, 1777-78, p. 296.

pose of determining whether Virginia shall ratify the new Constitution that has recently been submitted to the states.

It is the 6th of June. The governor of the state, Edmund Randolph, is addressing the convention with an eloquence which, if it equals his disregard for facts, must produce a profound impression. He is speaking of violations of the Constitution, and he says :—

“There is one example of this violation in Virginia, of a most striking and shocking nature—an example so horrid, that if I conceived my country would passively permit a repetition of it, dear as it is to me, I would seek means of expatriating myself from it. A man, who was then a citizen, was deprived of his life thus : from a mere reliance on general reports, a gentleman in the House of Delegates informed the house that a certain man (Josiah Philips) had committed several crimes, and was running at large, perpetrating other crimes. He therefore moved for leave to attaint him ; he obtained that leave instantly ; no sooner did he obtain it than he drew from his pocket a bill ready written for that effect ; it was read three times in one day, and carried to the Senate. I will not say that it passed the same day through the Senate, but he was attainted very speedily and precipitately, without any proof better than vague reports. Without being confronted with his accusers and witnesses, without the privilege of calling for evidence in his behalf, he was sentenced to death and was afterwards actually executed. Was this arbitrary deprivation of life, the dearest gift of God to man, consistent with the genius of a republican government ? Is this compatible with the spirit of freedom ? This, sir, has made the deepest impression on my heart, and I cannot contemplate it without horror.”<sup>1</sup>

Whatever may have been the impression made upon Mr. Randolph's heart, it cannot be difficult to estimate the impression made upon his head. The only point upon which he expressed himself as doubtful was almost the only point about which he was correct ; and what are we to say of his misrepresentations when we remember that he was not only attorney-general at the time of Philips' trial, but also clerk of the House of Delegates at the time the act of attainder was passed ?

On the following day Mr. Henry rose to reply to Governor Randolph ; yet, *mirabile dictu !* he did not controvert a single misstatement, but, admitting that Philips had not been executed according to “beautiful legal ceremonies,” proceeded to justify

<sup>1</sup> Elliot's Debates — Virginia, p. 66.

the passage of the act.<sup>1</sup> Henry was governor at the time of the trial and must have known all its particulars; his silence in the face of Randolph's charges can be explained, if at all, only by Jefferson's supposition that he forgot himself in the excitement of debate. In the course of his remarks Henry made the unfortunate, but perfectly true and intelligible, statement that Philips was no Socrates, whereupon Governor Randolph and John Marshall took occasion to charge him with maintaining that, because Philips was poor and ignorant, therefore he ought to have been attainted—a proceeding more creditable to their ingenuity than to their ingenuousness.<sup>2</sup>

Other members referred to the case, and all but one of the speakers assumed Randolph's representations to be correct.<sup>3</sup> Edmund Pendleton touched upon the matter six days later<sup>4</sup> (June 12), but unfortunately spoke so low that his words escaped the reporter. It is doubtful, however, whether he corrected Randolph, for three days afterwards we find Mr. George Nicholas affirming a bill of rights to be but a paper check, since Philips was executed without a trial.<sup>5</sup> We shall have occasion to refer to Pendleton's remarks hereafter; at present we can only wonder that such palpable misrepresentations, reflecting as they did upon the honor of the legislature, passed without contradiction in a convention which contained not only those who had been attorney-general and governor at the time of the trial, but also the speaker of the house who had signed the bill, one, if not two, of the committeemen who had been appointed to draft it, one of the privy councillors who had discussed the case, and three of the bench of judges who had tried Philips for robbery.<sup>6</sup> But we may leave the explanation of this colossal case of forgetfulness to the professed psychologist, and return to a discussion of the question just now raised—why Randolph had Philips indicted for robbery.

In Judge Tucker's *Blackstone*, first published in 1803,<sup>7</sup> may be found the following statement with regard to our case:—

“In May, 1778, an act passed in Virginia, to attain one Josiah Philips, unless he should render himself to justice, within a limited time: he was taken, after the time had expired, and was brought before the general court to receive sentence of execution pursuant to the directions of the act. But the court refused to pass the

<sup>1</sup> Elliot, p. 140.

<sup>3</sup> Ibid. pp. 236, 274.

<sup>5</sup> Ibid. p. 450.

<sup>2</sup> Ibid. pp. 193, 223.

<sup>4</sup> Ibid. p. 298.

<sup>6</sup> Randolph, Henry, Benjamin Harrison, John Tyler, Meriwether Smith (?), James Madison, Joseph Jones, John Blair, and Paul Carrington.

<sup>7</sup> Vol. I., Appendix, p. 293.

sentence, and he was put upon his trial, according to the ordinary course of law. — This is a decisive proof of the importance of the separation of the powers of government, and of the independence of the judiciary; a dependent judiciary might have executed the law, whilst they execrated the principles upon which it was founded.”

If this view be correct, the importance of the Philips case from a constitutional point of view is manifest, for it was not until nearly two years later that Chief Justice Brearley of New Jersey delivered his opinion in the better known case of *Holmes vs. Walton*. But Judge Tucker’s view has been called into question.

When Mr. Wirt was writing his life of Henry he was in the habit of applying to Mr. Jefferson for information — which was not always promptly furnished. On the 14th of August, 1814, however, he did write to Wirt about the Philips case;<sup>1</sup> and nearly a year later he furnished Mr. Girardin, who continued Burk’s *History of Virginia*, with additional information.<sup>2</sup> From these two letters we see that he was perfectly aware of the flimsy character of Randolph’s treatment of the case, and that he was equally opposed to the views of Judge Tucker that have just been cited. He says distinctly that Randolph told him, the first time they met after the Philips trial, that when Philips was taken, he (Randolph) “had thought it best to make no use of the act of attainder, and to take no measure under it; that he had indicted him at the common law for murder or robbery” — Jefferson forgot which. He then adds that the record of the case must decide between Randolph’s statements to himself and the statements of the same worthy on the floor of the Convention.

The question before us, then, assumes the following forms: Did the attorney-general, of his own motion, disregard the provisions of the act and have Philips indicted for robbery, or did the court refuse in set terms to carry out the act by ordering the execution of the attainted traitor, or was the attorney-general led to understand that such would be the judges’ action, whereupon of his own motion, or at their advice, he caused Philips to be indicted at common law?

Of these three forms the first may be summarily dismissed. In the only direct statement that we have from Randolph he stultifies himself by saying that Philips was really executed under the act of attainder. Then we have the very different statement

<sup>1</sup> Jefferson, *Works*, VI. 369.

<sup>2</sup> Jefferson, *Works*, VI. 439 (Congressional edition; Ford’s ed., II. 150–154, note); Girardin, pp. 305, 306.

made to Jefferson in which Randolph takes to himself the credit of having disregarded the act—which statement, be it remembered, comes to us in a letter written by Jefferson in his old age, at least thirty years after the conversation described took place. To put it mildly, there are some slight discrepancies here; and if Randolph could be so egregiously mistaken at one time, why should he not have been mistaken at another?

The second form of the question is the one to which Judge Tucker's authority lends countenance for an affirmative answer. The learned judge has long been known as an eminent lawyer and a painstaking writer. Would he have permitted himself to make so important a statement without having investigated the subject carefully? Besides, he was in a peculiarly favorable situation for learning the facts of the case. He had been made a judge of the General Court in 1787, when two of the judges at the time of the Philips trial were still on the same bench; and he was thrown into intimate association with two ex-judges of the same period.<sup>1</sup> Should not these men have known the facts, and would Tucker have dared to write as he did without consulting them?

On the other hand, it must be remembered that the judges kept quiet when Philips' case was being discussed in the Convention, and that Judge Tucker is by no means explicit in giving their grounds for the action attributed to them. There was no direct prohibition of bills of attainder in the Virginia Constitution of 1776, and although in 1782 in *Commonwealth vs. Caton*<sup>2</sup> we find the judges of the same court, with one exception, clear as to their right to declare a plainly unconstitutional act void, it is at least likely that they would have hesitated openly to claim this right in 1778 upon a very doubtful point and under a constitution not formally ratified by the people. They might all have agreed that bills of attainder were dangerous, and yet some might have held as the Supreme Court of the United States did subsequently in *Cooper vs. Telfair*<sup>3</sup>—that unless such acts were specially prohibited by the state constitution, the right to make use of them inhered in the state legislature—a right, of course, taken away by the Federal Constitution. On the other hand, they might have found latitude enough in the principle laid down by the Supreme Court of South Carolina in the case of *Bowman vs. Middleton* (1 Bay, 252) that a certain title, though based on a legislative act, could not be claimed, "being against common right and the

<sup>1</sup> Paul Carrington, Bartholomew Dandridge, John Blair, and Joseph Jones.

<sup>2</sup> 4 Call, 5-21.

<sup>3</sup> 4 Dallas, 14.

principles of *Magna Charta*." It seems unlikely, however, that Virginia judges took this stand.

The third form of our question appears best to deserve, on the whole, an affirmative answer. Granted that the judges did not particularly relish having to order a man to execution without a trial, and that they discussed among themselves the propriety of neglecting the provisions of the act of attainder; and granted, furthermore, that they intimated their views to Randolph, with the advice to indict Philips at common law, or that Randolph, learning their views in some way, feared that his prisoner would escape, and so indicted him,—and we have a solution that harmonizes well with the facts already cited. Furthermore, Randolph in his conversation with Jefferson might, intentionally or unintentionally, have given the latter to understand that *he* took the initiative in the affair; and Judge Tucker, reviewing the reminiscences of his colleagues in the light of a developed doctrine,<sup>1</sup> might easily have persuaded himself to transform a mere reluctance to perform a doubtful act into a positive refusal so to do. For we have the distinct statement of Edmund Pendleton, on the floor of the Convention, that the judges "felt great uneasiness in their minds, to violate the Constitution by such a law," followed by the apologetic statement that they had "prevented some unconstitutional acts,"<sup>2</sup> the inference, of course, being that they did not speak out plainly in the Philips case. Two very contradictory statements are thus reconciled at the expense, not of the honor, but of the memory, of the parties respectively making them, and a partial explanation is thus given of the silence of the judges in the Convention. A full explanation on their part might have revealed the fact that in 1778 they were not fully prepared to assert their independence of the legislature and their supervisory powers over its acts.

It would be interesting to know whether the Philips case was cited in the Philadelphia Convention of 1787 when the clause forbidding the states to make use of bills of attainder was under discussion; but the Journal is silent on the point. It would be

<sup>1</sup> *Marbury vs. Madison* (1803) is, of course, the great case that marks the development of the doctrine as far as the General Government is concerned; but one has only to read carefully the opinions in *Commonwealth vs. Caton* (1782, 4 Call, 5-21); in the *Case of the Judges* (1788—see Hening, XII. 532, 644, 764; *Journal of House of Delegates*, Extra Session, June 23-30, 1788; 4 Call; 1 *Virginia Cases*), and in *Kemper vs. Hawkins* (1793, 1 *Virginia Cases*, 20), to see whence Marshall derived the lucidity and boldness that marked his historic utterances. President Lyon G. Tyler deserves credit for having called emphatic attention to a fact still strangely overlooked by students of Marshall's career. See his *Letters and Times of the Tylers*, I. 177 seq.

<sup>2</sup> Elliot, p. 299.

interesting also to compare the case with other instances of the use of bills of attainder in this country; but space is wanting, nor has the writer had access to as full materials as he could desire. As the numerous acts passed against Tories after the Revolution began were more for purposes of confiscation of property than of capture and punishment of offenders, they cannot profitably be compared with the act against Philips, in whose case capture and punishment constituted the main objects of the legislators. When the latter act is compared with those passed against William Claiborne (Maryland, 1637), Bacon and his followers (Virginia, 1677), Billy, an escaped slave (Virginia, 1701, —a curious case), and Richard Clarke (Maryland, 1705), it will be seen that not only is the Philips case a perfect example of the deliberate use of the dread power of attainder, but that it teaches us that written instruments are not, in troublous times, the inviolable safeguards of individual liberty that they are often supposed to be. The attainder of Josiah Philips was approved by men who, not two years before, had discussed and adopted the Declaration of Rights drafted by George Mason.

W. P. TRENT.